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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-482

STATE OF MICHIGAN,
Petitioner,
vs
THOMAS W. TUCKER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF DETROIT BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Office of the Prosecutor of Oakland County Michigan, counsel for the Petitioner, and by Kenneth M. Mogill, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The Detroit Bar Association is a private non-profit corporate association of attorneys with some 4,000 members.

The purposes for which the Association is formed as set forth in Article II of its Articles of Incorporation are as follows:

1. To maintain honor and dignity in the profession of law.
2. To increase its usefulness in promoting the due administration of justice.
3. To cultivate social intercourse among its members.

The Detroit Bar Association counts among its members the majority of attorneys practicing law in the City of Detroit.

The interest of *Amicus* in the case at bar stems from the importance of the issue involved, and the impact which the decision of this Court will have upon the criminal justice system.

SUMMARY OF ARGUMENT

Miranda v. *Arizona*, 384 US 436 (1966) has not proved to be an impediment of any consequence to effective law and forcement. Quite the contrary, in addition to the prophylaxis contemplated by this Court's decision, it has proven to have effectively served an educational purpose in sensitizing law enforcement officials to the constitutional rights of the subjects of their investigation, and in

so doing has tended to effectuate the basic principles upon which the decision was based. In addition to alleviating the inherent coercion of a custodial interrogation situation, the rule has deemphasized the role played by confessions in the prosecution of criminal offenses. This effect is in line with the traditional Anglo-American abhorence of convicting an accused out of his own mouth, a principle fundamental to the underlying rationale of *Miranda*. This area of criminal procedure is not one which is subject to half measures, or less than strict rules and guidelines. It is ingenuous in the extreme to speak of "modifying" the strictures of *Miranda*. *Miranda* represents a continuing normative principle of juridical morality, and the value of the rule in the context of criminal jurisprudence is not only as a procedural precept, but also as an ethical imperative. This function cannot be denigrated, and must not be abandoned. This Court's commitment to the principles embodied in *Miranda* should not be retreated from, and the prophylactic rule of that decision should not be retreated from.

ARGUMENT

With respect to the first question presented in the Writ of Certiorari, *amicus* concurs and urges upon the Court the arguments of law put forth by the respondent, but will not formally brief or argue that question.

Amicus will address itself herein only to the second question certified for review, and takes the position that *Miranda* v. *Arizona*, 384 US 436 (1966), represents a principle of continuing constitutional and practical validity, which should not be limited or abandoned by this Court.

It is submitted that the logic of *Miranda* is as compelling today as it was on the date of decision, some seven years

ago. Indeed, experience under *Miranda* not only demonstrates that the rule has not significantly impeded police work, but also points out the need for such a prophylactic principle in the first instance.

Studies conducted in large metropolitan areas such as Pittsburgh[1] and Denver[2] have shown that the *Miranda* rule has not significantly impaired the ability of law enforcement agencies to apprehend and convict the perpetrator of a criminal offense.

In Pittsburgh, for example, the study revealed that although only approximately two thirds as many suspects actually gave confessions after having been advised of their rights as did without *Miranda* warnings,[3] the conviction rate has decreased less than one half of one percent.[4]

Contrary to the predictions of the Nay-sayers, neither confessions nor, more importantly, convictions, have become impossible to obtain of persons duly advised of their constitutional rights. What is striking about the Pittsburgh survey, *amicus* submits, is not how few confessions have been obtained since the advice of rights has been required to be given, but rather, how many. While it has been suggested that the persistence and efficacy of police attempts to secure admissions through interrogation has not been af-

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[1] Note, *Miranda* in Pittsburgh, 29 U Pitt L Rev 1 (1967).

[2] *Laiken* Police Interrogation in Colorado, 47 Denver Law Journal 1 (1970).

[3] According to the above cited study, the police practice of attempting to obtain a confession in all cases did not change even with the requirement that suspects be informed of their rights to counsel and to remain silent. In the pre-Miranda era, 48.5% of the suspects gave confessions, while in the post-Miranda period, only 32.3% confessed. *Miranda* in Pittsburgh, *supra*, at 12.

[4] The pre-Miranda conviction rate was 66.8% while the post-Miranda conviction rate has been 66.4%. *Miranda* in Pittsburgh, *supra*, at 19.

fected by *Miranda*,[5] *amicus* suggests that the more significant observation to be gleaned from these data is that confessional statements are either playing a less significant role in the obtaining of convictions then they used to, or, perhaps, confessions were never as crucial to effective police work as was represented.[6]

Law enforcement can, and has learned to, live with Miranda.[7] Yet focusing on the "workability" of the warn-

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[5] *Laiken, supra,* at 41.

[6] The Pittsburgh study disclosed that the police felt confessions to be necessary to secure convictions in about twenty percent of all cases. *Miranda* in Pittsburgh, *supra,* at 15. The inaccuracy of this perception is shown by the data compiled by the Pittsburgh study, showing that no marked drop in conviction rate attended the rather notable decrease in the number of confessions obtained. If confessions were really necessary to conviction in one fifth of all cases initiated by the police, any drop in the number of confessions should produce a coordinate drop one fifth as large in the conviction rate (assuming all other factors to be equal); this, however, has simply not been the case.

[7] A study conducted in Macon and Knoxville, Tennessee, provides some interesting data. Law enforcement officers who regularly work with, and under the strictures of, the *Miranda* warning requirements, were interviewed with respect to their perceptions of that decision's effect on law enforcement. While the officers interviewed generally felt that *Miranda* was an obstacle to effective police work, less than one third of the officers interviewed identified the rising crime rate as a product of court decisions. The nature of the "obstruction" posed by *Miranda*, however, as perceived by the officers, is instructive. The study concluded, in this regard:

> They seemed to view the decision as a "stumbling block" to investigation—not so much because of any particular effect on the questioning process *per se*, but because, as one officer remarked, it required them "to go through the ritual and paper work and legal technicalities." They resented the alleged inconvenience and, to an even greater extent, they perceived a front implicit in the requirement of advising suspects prior to interrogation.

Stephens, Flanders and Conner, Law Enforcement and the Supreme Court: Police Perceptions of the *Miranda* Requirements, 39 Tennessee Law Review 407, 429 (1972).

ing requirement obscures the real question at issue; that is, the values which are served by the *Miranda* rule.

This Courts' decision in *Miranda* was premised upon a recognition that the custodial interrogation process is inherently coercive, coupled with the notion, fundamental to Anglo-American jurisprudence, that it is somehow unseemly, and improper in the context of our adversary system, to secure convictions out of an accused's own mouth. (The embodiment of this latter precept is, of course, the central meaning of the Fifth Amendment privilege against self-incrimination.) No rule of law can equalize the position of interrogator and accused.[8] The *Miranda* requirements, however, are designed, it appears, to directly affect this relationship by (1) sensitizing the interrogator to the rights of the accused and (2) increasing the ability of the accused to assert his rights in the context of the interrogation relationship.

The rights of the accused are not subject to question. They are embodied, after all, in the constitutional provisions which *Miranda* was designed to effectuate. Neither

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[8] In this connection, the Courts' attention is drawn to the conclusions of several studies aimed at determining the effect which *Miranda* has had upon the interrogator-accused relationship, and the perceptions of criminal defendants of the criminal justice system. It appears, first, that the relative lack of powerlessness which most suspects feel the setting of police investigation has not been significantly altered by the requirement that the police advise them of their constitutional rights. Thus, for most persons, accused of crime, the effective ability to assert those rights in the context of what is essentially an adversary relationship with law enforcement authorities has no been significantly increased. Moreover, the overall perception of the criminal justice system of most criminal defendants (particularly members of minority groups) particularly in regard to their ability to effect the course of enforcement efforts for their own position vis a vis law enforcement activities, has not been significantly altered. *Laiken, supra*, at 21; Bell, Racism in American Courts: Cause for Black Disruption or Despair? 61 California Law Review 165, 185 (1973).

can it be seriously argued that we do not want citizens to assert these rights. To so argue, of course, would be to suggest that the operative constitutional commands should be ignored. Yet this argument, or suggestion, seems to be the underlying, unspoken assumption of those who oppose the continuing viability of *Miranda*. This basically subversive position must be rejected by this Court.

Miranda was, after all aimed at enhancing and protecting the integrity of the fact-finding process, and at safeguarding the primacy of the State's interest in a fair criminal trial. The centrality of the interests represented by *Miranda* has recently been recognized and reaffirmed by this Court in *Schneckloth* v. *Bustamonte*, —U.S.—36 L Ed 2d 854 (1973), in declining to extend the warning requirement in effectuation of the "less central" protections of the Fourth Amendment. The Court there set out what is perhaps the central teaching of *Miranda:*

> That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact finding process in Court. The presence of an attorney and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evi-

dence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." [384 US] at 466, 16 L Ed 2d 694, 10 ALR 3rd 974

Set out in *Schneckloth* v. *Bustamonte*, *supra*, —US—, 36 L Ed 2d at 870.

The psychological correctness of the underlying precept of *Miranda*, that coercion is inherent in even ethical interrogations, has been completely validated not only by the literature of social psychology, but also by those studies and reviews of the subject which have been conducted since that decision.[9]

Whether or not *Miranda* has altered the perceptions of criminal defendants with respect to the power of police, it has certainly had a salutory effect in regard to educating the police themselves to the significance of the Fifth Amendment guarantee. For one thing, the studies seem to suggest that police officers, operating under *Miranda*, have come to downgrade the importance of confessions in effective police work.[10] The notion that the criminal laws can be adequately enforced without the necessity of securing evidence of guilt from the accused himself is certainly in line with the policies embodied by the Fifth Amendment privilege against self-incrimination.

Moreover, the studies point up that regardless of the police estimate of the *Miranda* decision, the warnings re-

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[9] See, e.g., Ellis, A Comment on the Testimonial Privilege of the Fifth Amendment, 55 Iowa Law Review 829 (1970); Foster, Confessions and the Station House Syndrome, 18 DePaul Law Review 683 (1969).

[10] Stephens, Flanders and Conner, *supra;* see also, Note, Interrogations in New Haven: Impact of Miranda, 76 Yale Law Journal 1519 (1967).

quirement has produced in law enforcement officers at least a rudimentary knowledge of and respect for the Fifth Amendment guarantees.[11] This educational value should not be lightly taken, as the recognition of fundamental rights is an indispensable prerequisite to ensuring that those rights are respected by those in whose hands they are most easily abused.

Not without significance, too, is the observation that *Miranda* represents a significant effort to elevate the morality of the criminal law. That it is the responsibility of the courts to ensure evenhandedness and propriety in the day to day street-level application of the law can hardly be questioned. Nor can the proposition that the greatest measure of fairness is appropriate to the administration of the criminal justice system. As a moral imperative, *Miranda* may be seen as an embodiment of the following precept:

> The administration of justice must attain the highest standard of fairness, indeed, of basic decency. In a government of law, the administration of that law *is* the measure of the society.[12]

Indeed, those who urge the abandonment of *Miranda* as an unaffordable procedural nicety would require this Court to disregard this normative precept, and to accept instead the proposition that it is acceptable to take advantage of an accused's ignorance in the name of combatting crime. *Amicus* contends that this nation had not reached the state of moral decay where this Court can conclude that the formalities of warning and advice can only be tolerated at the arraignment and preliminary hearing stage so long as

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[11] See, e.g., Stephens, Flanders and Conner, *supra*.

[12] Cray, Criminal Interrogation and Confessions: The Ethical Imperative, 1968 Wisconsin Law Review 173, 174 (1968).

we allow the police an opportunity to render them meaningless by obtaining a confession absent the assurances provided by the giving of warnings.

Through long and hard endeavor, through experiment and experiential validation, and a refusal to sacrifice principle for expediency, this Court has sought to erect a panoply of basic freedoms about the criminal accused. Petitioner urges upon this Court, in the name of expediency, and in the face of empirically derived intelligence to the contrary, the suggestion that a major portion of these protections be done away with. There is simply no way in which the values to be served in this area can be adequately protected by half measures. The Court must be guided by what it has so recently characterized as the "classic admonition" of *Boyd* v. *U.S.* 116 US 616, 635 (1913) *(Schneckloth* v. *Bustamonte, Supra,* —US—, 36 L Ed 2d at 863):

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedures. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their effacacy, and leads to gradual depreciation of the right, as if it constituted more in sound than in substance. It is the duty of courts to be watchful for constitutional rights of the citizen, and against any stealthy encroachments thereon.

This Court should reject the facile argument that the goals of *Miranda* can be achieved even while "modifying"

the requirements therein enunciated. *Miranda* was based upon the recognition that, in this fragile area of liberty, nothing less than an absolute rule would serve to protect the constitutional values involved. Subsequent experience has not shown this assumption to have been mistaken. Neither has this experience shown the costs of the absolute protection to have been of crippling magnitude. Indeed, such reliable evidence as we have indicates that *Miranda* has been no deterrent to competent law enforcement.[13] Moreover, given the basic commitment to the adversary model, and the intelligence gleaned from the behavioral sciences regarding the inherent unreliability of extra-judicial confessions, and the illusory nature of "voluntariness" in a custodial interrogation setting, *amicus* submits that the "price" which we pay for the prophylaxis insured by the *Miranda* rule is small indeed in relation to the magnitude of the values which we seek to protect.

[13] See authorities cited above, and, in summary, ALI Model Code of Pre-Arraignment Procedure 101-49 (Study Draft No. 1, 1968).

CONCLUSION

The rule enunciated by this Court in *Miranda* v. *Arizona*, 384 US 436 (1966) is a sound one, which has its roots not only in the fundamental precepts of our Anglo-American jurisprudence, but also in the most informed current intelligence regarding human behavior. The social costs attendant upon its enforcement are, at most, negligible. It has served an important and continuing purpose in actualizing fundamental constitutional guarantees at the most meaningful level—Citizen Interaction with Law Enforcement Officials and it represents a continuing social commitment to the fundamental precepts of our system of ordered liberty. To "modify" the rule is to abandon it, and to abandon the rule is to take a giant step backward in the development of a human and realistic criminal jurisprudence.

The holding of this Court in *Miranda* v. *Arizona, supra* must remain inviolate.

Respectfully submitted,

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